FOR ARGUMENT.

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In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

Appellee Bretz, other than raising a question relative to jurisdiction, adopts the brief of Appellee Cline with respect to the constitutionality of the Montana statute that holds that jeopardy does not attach until after the first witness is sworn. Appellee Bretz adds little to the argument of Appellee Cline on that point, and then devotes the bulk of his brief to the issue of manifest necessity. The state has not addressed the issue of manifest necessity.

Jurisdiction was addressed by the Appellant at the outset in the Appellant's brief, in a concise statement, as required by the rules of this court. The Ninth Circuit has held, in effect, that the Montana statute that jeopardy does not attach until after the first witness is sworn is unconsitutional, and this holding has been addressed directly by the Appellant and both Appellees.

Appellant urged that under the common law, jeopardy did not attach until a verdict was rendered. Appellees agree (brief of Appellee Cline, Page 7). I. e., at the time of the Constitution of the United States, jeopardy did not attach until then.

There is little question but that this was the law at the time of the constitution. Nor is there much question but that this concept has been changed, by the courts and state legislatures, in various jurisdictions, federal and state, throughout the United States.

The concept of not being twice put in jeopardy, or twice tried, *Downum v. United States*, 372 U. S. 734, 736 (1963); *Adney v. United States*, — U. S. —, 52 L. Ed. 2d 651, 97 S. Ct. — (1977), is not only uniformly accepted, but is now a part of the protection under the Fifth Amendment, *Serfass v. United States*, 420 U. S. 377, 388 (1974). And the rationale is not lacking.

But determining the exact moment that a person is twice-tried, the moment jeopardy attaches, is not that clear, and there is no rationale in any of the decisions of this court holding that jeopardy attaches when the jury is sworn.

This was the thrust of Appellant's brief, and totally ignored by Appellees.

A reading of the cases makes it clear that all have agreed that jeopardy attaches when the defendant is put to trial before the trier of the facts, that is, when the trier of the facts began to hear evidence. See *Breed v. Jones*, 421 U. S. 519, 531 (1974).

Appellees take the position that if *Breed* would have been a jury case, jeopardy would attach when the jury was impaneled and sworn, i. e., *before* the trier of the facts began to hear evidence. They may well be right, but not by reason of any stated rationale.

Both sides have cited *Serfass* as authority for their respective positions; the Respondents, because *Serfass* reiterates the rule in federal court that jeopardy attaches, in a jury case, when the jury is impaneled and sworn; the Appellants, because *Serfass* held "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy' ", i. e., the rule has been an "aid" in determining when jeopardy attaches. *Serfass* went on to say that the constitutional prohibition has no application until a defendant is put to trial before the trier of the facts. The Model Penal Code, and the states that have adopted it (e. g., Montana, Kentucky, Arizona) read this to mean that the trier of the facts has to hear something before jeopardy attaches, as in a federal non-jury case.

In truth and fact, no jury or judge could rebut the defendant's presumption of innocence until something had been heard, so no jeopardy could attach until then. But

that would make the determination vary in every case. Accordingly, the Model Penal Code adopts an earlier point in time than when jeopardy actually attaches, the time at which the first witness is sworn (even before he testifies), the same as a federal non-jury case, and goes on to state that there is no difference in a jury and non-jury case for the application of the rule. And there really isn't.

This doesn't mean that the federal courts, congress, the states, cannot adopt an even earlier point in time, but the constitutional prohibition does not come into play until jeopardy actually attaches . . . and that is how the Appellants read *Serfass.*

Any other argyments relative to trial preparation, etc., are equally true under either rule, i. e., defendant and his counsel put in the same preparatory work up until the moment before the jury is sworn as they do up until after the first witness is sworn (Appellee Bretz expressed this very well on Page 14 of his brief).

And, the concern of Appellee about prosecutorial manipulation has been well met by Justice Haswell in *State v. Cunningham,* 535 P. 2d 186 (Mont., 1975) (App. 21-28, at p. 26).

CONCLUSION

In conclusion, we would ask that the Ninth Circuit Court of Appeals' decision be reversed, and that the Montana statute, holding that jeopardy attaches in a jury trial at the time when the first witness is sworn be held constitutional.

Respectfully submitted this 4 day of October, 1977.

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